Filed 12/18/12 P. v. Gutierrez CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SEBASTIAN ESTEBAN GUTIERREZ, Defendant and Appellant.	E054193 (Super.Ct.No. RIF150680) OPINION

APPEAL from the Superior Court of Riverside County. Michael B. Donner, Judge. Affirmed.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton, and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Sebastian Esteban Gutierrez appeals his conviction on multiple counts of sexual molestation of his stepdaughter beginning when she was six and ending with his arrest when she was nine. He contends that his conviction on two counts of sexual intercourse or sodomy on a child under the age of 10, in violation of Penal Code section 288.7, subdivision (a),[1] must be reversed because the evidence does not compel the conclusion that the acts of intercourse and/or sodomy occurred only after September 20, 2006, the effective date of that statute. Rather, he contends, the evidence permits the conclusion that some such acts took place before the effective date of the statute, and the jury was not instructed to base a conviction only on acts which it found to have occurred after that date.

We conclude that while there is little evidence that acts of sodomy or sexual intercourse took place before September 20, 2006, the evidence leaves no reasonable doubt that acts of sodomy and sexual intercourse took place after September 20, 2006. Accordingly, we will affirm the conviction on both counts.

PROCEDURAL HISTORY

Defendant was charged with two counts of sexual intercourse or sodomy with a child 10 years old or younger (§ 288.7, subd. (a); counts 1 & 2); three counts of aggravated sexual assault on a child (§ 269, subd. (a)(5); counts 3 through 5); and three

[1] All statutory citations refer to the Penal Code.

counts of forcible lewd acts upon a child under the age of 14 (§ 288, subd. (b); counts 6 though 8).

A jury found defendant guilty on all counts as charged. The court sentenced defendant to consecutive terms of 25 years to life on counts 1 and 2 and to consecutive terms of 15 years to life on counts 3 through 5. The court imposed full-term consecutive terms of six years on counts 6 through 8. The sentence imposed on counts 1 through 5 was made consecutive to the determinate term on counts 6 through 8.

Defendant filed a timely notice of appeal.

FACTS

Jane Doe was born in December 1999. When she was less than a year old, her mother married defendant, who is not Doe's biological father. Defendant lived with Doe and her mother and with the two children born to defendant and Doe's mother, until he was arrested in May 2009.

When Doe was six years old and in first grade, defendant began to molest her. At first, his activities were limited to touching Doe's buttocks and chest and kissing her on the mouth. Later, he began touching her genitals with his hand and inserting his finger or fingers into her vagina. At some point, he progressed to inserting his penis into her anus and into her vaginal area.

In May 2009, when Doe was nine, as Doe was undressing to take a bath, Doe's mother discovered a heart shape drawn on Doe's upper leg or groin, along with Doe's name. The previous evening, Doe's mother had gone into the bedroom she shared with

defendant and discovered Doe sitting on the bed with her legs over the side of the bed and defendant kneeling in front of her. Doe's dress was pushed up toward her waist. When Doe saw her mother, she pushed her dress back down and ran out of the room. Defendant told her that Doe had wet or soiled her underwear and that he was cleaning her up. Both defendant and Doe seemed frightened. (At the age of nine, Doe did still occasionally wet or soil herself or wet the bed.)

Doe's mother had begun to suspect that defendant "wanted to do something " to Doe or that perhaps he had already done something to her. She took Doe to a hospital, and defendant was arrested after that.

On June 4, 2009, Doe was examined by Dr. Susan Horwitz, a doctor who worked in the child abuse unit at Riverside County Regional Medical Center. The examination did not show any overt evidence of molestation. However, Dr. Horwitz explained that it was unlikely that there would be any such evidence, because in most cases, the molestation causes little or no physical trauma. Doe had reported penetration. However, in most cases with very young girls, the penetration is only partial, "just through the labia." She explained that although the child describes the penis going into her private part, the child does not understand the anatomy and understands insertion between the labia as penetration. Full penetration through the hymen would cause severe bleeding and physical trauma in a little girl.

Also on June 4, 2009, Doe was interviewed by a social worker working in conjunction with "RCAT," the Riverside County Child Assessment Team. A DVD of the

interview was played for the jury. In it, Doe described molestation by defendant which began when Doe was six. (The interview is described in detail below.)

LEGAL ANALYSIS

THERE WAS NO EX POST FACTO VIOLATION

Counts 1 and 2 of the operative information both alleged that "on or about December 2005 through and including May 2009," defendant engaged in sexual intercourse or sodomy with Doe in violation of section 288.7, subdivision (a). Section 288.7, however, was enacted in 2006 and only became effective on September 20, 2006. (Stats. 2006, ch. 337, § 9, eff. Sept. 20, 2006.) The ex post facto clauses of the state and federal Constitutions prohibit imposition of punishment for offenses committed before the effective date of the statute under which the defendant is prosecuted or sentenced. (*People v. Hiscox* (2006) 136 Cal.App.4th 253, 257.) Accordingly, defendant could be convicted and punished under that statute only for acts of sodomy or sexual intercourse which occurred on or after that date.

However, the jury was not instructed that it must unanimously agree that one or more acts of sexual intercourse or sodomy occurred on or after September 20, 2006; rather, the jury was instructed that it had to agree unanimously as to one or more acts which occurred during the period from December 2005 to May 2009. Defendant contends that because the jury was not required to determine that at least one act per count occurred after September 20, 2006, and because the evidence was ambiguous as to the dates on which the acts occurred, his convictions on counts 1 and 2 must be reversed.

The prosecution bears the burden of proving that the charged offenses occurred on or after the effective date of the statute under which the defendant is charged or under which he or she will be punished. (*People v. Hiscox*, *supra*, 136 Cal.App.4th at p. 256.) An ex post facto violation resulting in an unauthorized sentence may be raised on appeal even if the defendant failed to object below. (*Id.* at p. 258.) Review is de novo, under the harmless error analysis of *Chapman v. California* (1967) 386 U.S. 18, 24:

"Since the jury was not asked to make findings on the time frame within which the offenses were committed, the verdicts cannot be deemed sufficient to establish the date of the offenses *unless the evidence leaves no reasonable doubt that the underlying charges pertained to events occurring on or after* [the effective date of the statute]. [Citation.] It would be inappropriate for us to review the record and select among acts that occurred before and after that date, or to infer that certain acts probably occurred after that date. [A defendant] has a constitutional right to be sentenced under the terms of the laws in effect when he committed his offenses. For a court to hypothesize which acts the jury may have based its verdicts on, or what dates might be attached to certain acts based on ambiguous evidence, would amount to 'judicial impingement upon the traditional role of the jury.' [Citation.]" (*People v. Hiscox*, *supra*, 136 Cal.App.4th at p. 261, italics added.)

Here, even though the evidence is vague as to when defendant first engaged in sodomy and sexual intercourse with Doe, it leaves no reasonable doubt that acts of sodomy and sexual intercourse occurred after September 20, 2006. Doe was born in

December 1999. She was nine years old and in third grade when she spoke to the social worker on June 4, 2009. Although she described acts which might have occurred as early as 2005, when she was six and in first grade, she also testified unequivocally that acts of both sodomy and sexual intercourse occurred after the family moved from a house on Atwood in Moreno Valley to a house on Ramsgate in Moreno Valley. This occurred at some point while Doe was in third grade; the family lived in both the Atwood house and the Ramsgate house during Doe's third grade school year.

Doe described the events pertaining to her molestation by defendant as follows:

On June 4, 2009, after the social worker asked Doe why she was there, Doe said that defendant had kissed her and then described the incident which led to her mother's discovery of the molestation. The social worker then asked if defendant had kissed her other times. Doe responded, "Sometimes he, he would put his private part in my private part." The social worker then asked when was the last time that happened. Doe replied, "I don't remember, because he has done that to me uh, almost all the time." The social worker then asked, "How old were you when stuff like that started happening with Dad?" Doe replied, "The first time he did it, I was like, I was six years . . . and I was in first."

Defendant contends that this interchange was sufficient to allow the jury to conclude that defendant first had sexual intercourse with Doe when Doe was six, which would have been in 2005. However, the ensuing conversation makes it clear that although defendant began molesting Doe when she was six, he did not begin engaging in sexual intercourse or sodomy with Doe until later.

After Doe said she was six when "stuff" started, the social worker asked, "So tell me about the first time something happened with Dad. What happened?" Doe replied that defendant had put his "whole hand" on her "butt." She described how he put his hand under her clothes and moved his hand "all over" her buttocks, but only on the outside. She said "nothing else" happened that day. Later on, she said, defendant began to touch her with his "private part," first on her "butt" and later on her "front." He would put his hard "private" into her private part and into her "butt." Doe did not remember how many times defendant had done that, and did not clearly remember when he first did it, but she thought she was eight or nine. Doe turned eight in December 2007, after the effective date of section 288.7.

When she testified at trial almost two years later, Doe was also uncertain when the sodomy and intercourse had begun. She first described the incident in which defendant first stroked her buttocks. She then described the first time defendant touched her "front private part." She thought she was seven and in second grade. She asked him to help her get her bike out of the garage, and he touched her front private part briefly. He put his finger inside her, and it hurt. She could not recall whether he had ever touched her front private part even on the outside before that incident. She did recall that he put his fingers inside her vagina a number of times while they lived in the first house in Moreno Valley, on Atwood, and also after they moved to the second house, on Ramsgate. She was in third grade when they moved.

She then described an incident in which defendant used his penis to rub against her private part. She said he never put his penis into her front private part. Later, she testified that defendant "tried" to insert his penis into her front private part on several occasions but was only able to put it in "a little bit." It was enough, however, to hurt and to cause her to feel a burning sensation when she would urinate for a day afterward. The first time was at the first house, on Atwood. He also "tried" to put his penis into her front private part after they moved to the second house, when she was in third grade.

Doe also testified that defendant put his penis into her "back private part." She thought this happened when she was eight and in second grade, but she did not remember the first time this happened. She did not remember which house they were living in. She then described the incident in more detail and testified that it happened when she was eight and living in the second house, on Ramsgate. She recalled that there had been three instances of sodomy but could not recall any details. She did not say when the other two instances occurred.

Doe's trial testimony was unequivocal that both sodomy and sexual intercourse occurred during her third grade school year, possibly before they moved, but definitely after they had moved. She was nine years old and still in third grade when she spoke to the social worker on June 4, 2009. Accordingly, the acts Doe described took place in late 2008 or in 2009. Even if some jurors might have concluded that sexual intercourse first occurred earlier than Doe's third grade school year, the evidence leaves no reasonable

doubt that acts of sodomy and sexual intercourse occurred in 2008 and/or 2009, after the effective date of section 288.7. There was no ex post facto violation.

DISPOSITION

The judgment is affirmed.

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MCKINSTER
J.

We concur:

HOLLENHORST
Acting P. J.

RICHLI
J.